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## THE EXTENT TO WHICH AMERICAN STATUTES MAY GO IN AUTHORIZING COMPLETE DISPOSITION OF CAUSES BY APPELLATE COURTS.

In 72 Central Law Journal 39, we set out the authorized rules under the English Judicature Act for the taking of a cause to the Court of Appeal and its disposition in the way of a trial *de novo*. The method there is not a counterpart of that adopted by us for appeals from a justice of the peace to a superior court of original jurisdiction, but it resembles it very greatly.

The English Court of Appeal is vested with like authority to dispose of a case, but it either does this on the case as presented in the court of first instance or it supplements that record with other evidence or testimony, such as affidavits, documentary evidence, oral testimony before the court or depositions taken by a commissioner or examiner.

Also it may render whatsoever judgment the merits of the case may require—even one more detrimental to the appellant than has already been rendered without it being absolutely necessary for the appellee to ask for the judgment to be varied in this regard. In short, the English Court of Appeal, though constituted like an American appellate tribunal, that is to say, without any jury as triors of fact, has as full power as, and wider discretion as to the form of proof and limiting same than, the court of original jurisdiction.

It seems evident that such a plan cannot be adopted in its entirety in this country because of American constitutions.

Thus there are generally found in these constitutions clauses which preserve inviolate the right to jury trial. This has been construed as applying to cases in which there existed at common law trial by jury.

Therefore we take it that as to all such cases there is a limit to statutory regulation of appeals, even though it be conceded that the right of appeal is a statutory, and not a constitutional right. Also it is apparent, that even where the right of appeal is constitutional, as, for example, as to certain cases under the Illinois constitution, an appellant cannot carry an appellee into a court for a new trial upon questions of fact, where jury trial is not preserved, if jury trial is a constitutional right.

Considering then, as generally held, that the right of appeal is not guaranteed by American constitutions, even though appellate tribunals are constitutional courts, but is of statutory origin and regulation, then almost any terms may be imposed upon an appellant that the legislature sees fit to impose, so long as what the statute grants infringes in no way upon the constitutional rights of an appellee.

This exception cuts very greatly into the English plan, but there would seem to remain quite an extensive field for regulation whereby simplicity in the taking of appeals could be provided for and conclusiveness in disposition of causes could be attained. We could not, possibly, provide as against the consent of appellees, that any question of fact should be rejudged by an appellate court, further than as to the sufficiency of evidence to support a judgment already rendered, and, therefore, we cannot provide, as do the rules under the Judicature Act, for a motion for new trial, by way of appeal. Neither, it seems to us, may it be provided that the testimony or evidence may be supplemented, as against an appellee.

There seems, however, no difficulty in applying the English rule to all causes of an equitable nature and to such special or other proceedings to which the constitutional guarantee of trial by jury does not apply. This would mean that the rule in appeals in equity causes may be extended both to other causes and to the taking of other evidence with the same latitude of discretion and in the various ways open for the English Court of Appeal.

As to cases where this cannot be done, so far as appellees are concerned, statute might provide that if they seek any relief by way of cross-appeal, or make any claim that the judgment appealed be varied in

any respect, they should be deemed appellants, so that the constitutional right of jury trial is waived, and the cause as wide open for consideration and determination as in equity and other causes where no trial by jury is guaranteed.

But, even should an appellee not place himself in such position, terms might be imposed on an appellant, that the appellate court should have jurisdiction to vary the judgment in any way whatsoever to the advantage of appellee, that the merits of the cause would seem to require, whether appellee asked for such advantage or not.

If, to this grant of jurisdiction, the statute enjoined the duty of conclusive determination of every cause without remanding same to the court appealed from and in addition required it in every case of modification to give to appellees the right to accept such modification as a condition of avoiding a retrial in the lower court, we will have advanced greatly along the line of the completer English system.

We need in our system some deterrent of frivolous or even speculative appeals. Generally an appellant reasons, that, at least, an affirmance can do no more than add costs and interest to the judgment appealed from, but, if a fair view of the evidence may support a larger recovery, often he might forego appeal—especially as even error, if shown to the higher court, will not secure a reversal and remand, but at most a modification, which appellee may accept.

Delay and another chance of escape in the court of original jurisdiction are the particular banes of our American system, and the more we limit the right of conclusive disposition by appellate courts, the more these evils grow.

One, among other things that vex our administration of law, is what is known as the theory of the case. Our appellate courts quite generally say, that upon the theory a case is tried in the lower court, the same is adhered to in the court above. A principle of estoppel is applied, therefore, in appeals, but it extends no further. If some error in an instruction or ruling upon evidence is made in the pursuit of that theory, the estoppel counts for nothing, and yet one thus picks the teeth of opposition more to an opponent's possible injury than otherwise.

There are many reasons why our system works more like a gamble than does the English plan, and we will revert to its defects in our next article, and suggest what we think may tend to their elimination.

C.

## NOTES OF IMPORTANT DECISIONS

APPEAL AND ERROR—CONSTITUTIONAL QUESTION FIRST PRESENTED ON MOTION FOR REHEARING IN STATE SUPREME COURT.—It appears in the case Illinois C. R. Co. v. Kentucky 31 Sup. Ct. 95, that on appeal by a railroad from a judgment for taxes the judgment was affirmed by Kentucky Court of Appeals and a petition for rehearing presented federal questions under the 14th Amendment. Justice Hughes, speaking for the court upon motion to dismiss the writ of error to the State Court, said: "The court entertained the petition and extended its opinion, holding that no right of the appellant under the 14th Amendment had been violated by the decision. Thereupon this writ of error was brought and, as the State Court passed upon the federal questions, this court has jurisdiction. Mallett v. North Carolina, 181 U. S. 589."

It happened in this case that the decision of the State Court was affirmed, but it would seem that the mere determination of the State Court to entertain such a question on a petition for rehearing ought not to be determinative of the right of a party to have his judgment unassailable, if these federal questions ought to have been raised at an earlier stage of the case. We believe it has been frequently held that the federal question must have been raised in the case for the federal Supreme Court to pass upon it. A petition for rehearing is after a case is disposed of and its office, well understood, to ask a court to consider again what it decided about that case so far as questions were raised in respect thereof. It is not for an appellate court to import into a case, what was not there and especially where it has passed upon the case. However, as the rule is otherwise decided to be, it would seem that a state court ought not to make any reference at all to federal questions thus raised for the first time, unless, at least, they are deemed to work a reversal of the decision already rendered.

## CONSTITUTIONALITY OF FEDERAL CORPORATION TAX LAW.

The question for consideration is whether the Corporation Tax Act of 1909 is direct in the Constitutional sense and void because not apportioned among the states in proportion to their population.

The term "direct taxes" has occasioned no little difficulty. In the federal convention, when Mr. Rufus King asked what was the meaning of direct taxation, no one answered. Hamilton, in his legal briefs, says: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so important a point, are to be found in the Constitution. We shall seek in vain for any antecedent legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point."[1]

The economic or scientific theory of a direct tax is best explained by Mr. Adam Smith in his immortal work, "The Wealth of Nations." "The taxes which, it is intended, should fall indifferently upon every different species of revenue, are capitation taxes, and taxes upon consumable commodities. These must be paid indifferently from whatever revenue the contributors may possess; from the rent of their land, from the profit of their stock, or from the wages of their labor."

Taxation is that part of the revenue of a state which is obtained by compulsory dues and charges upon its subjects. "It is the simple operation from taking small portions from a perpetually accumulating mass, susceptible of almost infinite divisions."[2]

In the economic development of states, taxes have come to be grouped in different ways, according to variations in the method of levying them or the means of enforcing collection or other differences. One of the most usual divisions is into direct and indirect. Direct taxes are those that are levied "upon the very person who it is supposed as a general thing will bear their burden." The general property tax, the income tax, the poll tax, may be classed as direct taxes for the reason that when a person pays one of these taxes, he is likely to bear the burden himself and is not likely to shift it to another. The customs duties, the internal revenue tax, and many fees and licenses, are to be classed with indirect taxes. The distinction between direct and indirect taxation is made comparatively clear by considering the manner in which the tax is levied. "Direct taxes are those levied on permanent and recurring occasions and are assessed according to some list of roll of persons. Indirect taxes on the other hand, are levied according to a tariff on the occurrence of transactions and events which are not previously ascertainable as regards particular persons. The amount of a direct tax assessed in this way is certain and regular, while an indirect tax is uncertain and irregular as regards individuals."[3]

The most comprehensive tax of indirect taxation, is the excise tax. It is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale, sometimes upon the vendor.[4] "Excise" is applied to the tax laid upon manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.[5]

Excise taxes are not strictly "duties;" though both are indirect taxes, the former is an internal, the latter an external tax. Mr. Franklin in 1776 had said upon his examination before the House of Commons that, "An external tax is a duty laid on commodities imported; that duty is added to the first cost and other charges on the commodity, and, when it is offered to sale makes a part of the price. If the people do not like it at that price, they refuse it; they are not obliged to pay it. But an internal tax is forced from the people without their consent, if not laid by their own representa-

(1) Vol. VII. p. 848.
(2) Gibbons v. Ogden, 9 Wall. 196. Per C. J. Marshall.
(3) From Nicolson in Encyc. Americana.
(4) Pac. Ins. Co. v. Soule, 7 Wall. 445.
(5) Cooley Const. Limit. 5 Ed. 595.

tives. The Stamp Act says, "We shall have no commerce, make no exchange of property with each other, neither purchase nor grant, nor recover debts; we shall neither marry nor make our wills, unless we pay such and such sums; and thus it is intended to extort our money from us, or ruin us by the consequence of refusing to pay."[6]

Although the above statements were made at the time when the Colonies were under British taxation without representation, the practical effect of such a tax is equally true to-day, notwithstanding that it is imposed on us through our representatives in Legislature or Congress.

Decisions in the United States Supreme Court have determined what kind of taxes may be regarded as direct or indirect within the meaning of the Federal Constitution. The first judicial construction placed upon the term "direct taxes" commences with the case of Hylton v. United States,[7] In the year 1794, Congress laid a tax of ten dollars on all carriages, and the rate was thus made uniform. The validity of the statute was disputed; it was claimed that the tax was direct, and should have been apportioned among the states. The court decided that this tax was not direct. Opinions were delivered by Messrs. Justices Chase, Patterson, Iredell, and concurred by Mr. Justice Wilson.

Mr. Justice Chase said in that case: "I am inclined to think that the direct taxes contemplated by the Constitution were only two, namely, a capitation or poll tax, simply, without regard to property, profession, or other circumstance, and a tax on land. I doubt whether a tax by general assessment of personal property within the United States is included within the term direct tax." Mr. Justice Patterson said, "Whether direct taxes in the sense of the Constitution comprehended any other tax than a capitation tax and a tax on land, is a questionable point. If Congress, for instance, should tax in the aggregate or mass, things that generally pervade all the states in the Union, then perhaps, the rule of apportionment would be the most proper, especially if an assessment were to intervene. This appears from the practice of some of the states to have been considered a direct taxation. Whether it be so under the Constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal—I will not say the only—objects that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land. It is not necessary to determine whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it, or else the provision made against taxing exports would be easily eluded. Land independently of its produce is of no value. All taxes on expenses or consumption are indirect taxes."

In the case of Pacific Insurance Co. v. Soule,[8] the point was raised whether an income tax imposed upon the gross amount and income of insurance companies, was a direct tax or an excise. Mr. Justice Swayne, after reviewing the Hylton case and other eminent authorities, reaches this conclusion. "If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges. * * * The consequences which would follow the apportionment of the tax in question among the states and territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light. where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the

(6) 16 Parl. Hist. 144.
(7) 3 Dall. 171.
(8) 7 Wall. 433.

Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition. To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise."

In the case of State v. W. & B. R. R. Co.[9] it was likewise held that an income tax is not a direct tax within the meaning of the Maryland Bill of Rights.[10]

Having thus laid down the doctrine that a tax upon carriages and a tax on incomes of insurance companies, is not a direct tax but an excise, a question arose whether the tax of ten per centum imposed by the Act of July 13th, 1866, on the notes of Banks chartered by states, was a direct tax so as to come within the rule of apportionment.

Mr. Chief Justice Chase, rejecting the political-economic view and adhering to the cases of Hylton v. United States, and Pacific Insurance Company v. Soule, thus lays down the proposition: "Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the word direct taxes in the Constitution. We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. * * * Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly, it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, etc.[11]

So it was held that a tax on interest paid by transportation corporations under the Act of July 13, 1866, to be an excise on their business, to be paid by them out of their earnings, incomes and profits.[11]

It was argued in the case of Scholey v. Chew,[12] that the "succession tax" imposed by the Acts of 1864 and 1866, on every "devolution of title to any real estate, to be a direct tax on land, and therefore repugnant to the United States Constitution for want of apportionment. But Mr. Justice Clifford thus distinguishes it, "Such a tax or duty is neither a tax on land nor a capitation exaction, * * * the succession or devolution of the real estate is the subject-matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed, or laws of descent, from a grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived; nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction."

In the case of Springer v. United States,[13] an attempt was made to convince the court that a tax levied upon the income, gains and profits, is a direct tax, according to

(9) 45 Md. 361, 379.

(10) Also State v. N. C. R. R. Co., 44 Md. 131, 169, and cases therein cited.

(11) Railroad Co. v. Collector, 100 U. S. 595, 598. Cf. National Bank v. United States, 101 U. S. 1.

(12) 23 Wall. 331, 347.

(13) 102 U. S. 587.

the opinion of the best authors on political economy. But the court dismissed that argument after reviewing the former precedents laid down by the same tribunal, and concludes: "The numerous citations from the writings of foreign political economists made by the plaintiff in error are sufficiently answered by Hamilton in his brief. The subject in our constitutional law, is one exclusively in American jurisprudence."[14]

Such was the limited construction placed upon the term "direct tax," as used in the Federal Constitution; and outside of a capitation tax, or a tax on land, all other taxes were excises or duties, and do not come within the rule of apportionment. Whatever might be the economic or scientific view on such propositions, this exclusively American doctrine was maintained and supported by Justices Chase, Patterson, Swayne, Clifford, Iredell, and Wilson —jurists, whose great judgments and magnitude of reason have added greatly to the dignity of American jurisprudence, and whose broad foresight into the future of the American commonwealth, accomplished much in their endeavor to establish a wholesome system of taxation, the omission of which, has led to the speedy failure of the confederation.

In the case of Pollock v. Farmers' Loan & Trust Co.,[15] known as the income tax cases, it was held by a divided court that a tax upon the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore unconstitutional and void, because not apportioned. This case took a decided turn from all the former cases, although in no sense reversing them. Mr. Chief Justice Fuller, in his lengthy opinion, does not give a satisfactory reason for reaching his conclusions, and very unhappily distinguishes the Hylton case, alleging that the Chief Justice in that case and the concurring Mr. Justice Wilson, the former who with the First Secretary of the Treasury argued the case in the Circuit Court in behalf of the defendant, the latter who was the then district judge, in deciding it, each was supposed to have defended his own private opinion. The court concludes, basing its contentions mostly on the "views taken by cyclopædist, lexigraphers, and political economists, and generally by the classification of European governments wherever an income tax obtains."

Such arguments were flatly repudiated by the Court in the Springer Case and Veazie Bank Case, holding a tax upon incomes and excise, theories from the political-economic point of view to the contrary notwithstanding. In the same case[16] Mr. Chief Justice Fuller, in distinguishing the Springer case, assigns his reasons that the income there was not derived from real estate, but was in part professional as attorney-at-law and the rest interest on United States bonds. He goes on to say, that "the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty, might be held to be direct."

"Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land."

"But we are considering the rule stare decisis, and we must decline to hold ourselves bound to extend the scope of decisions—none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of which held real estate liable to direct taxation only—so as to sustain a tax on the income of realty on the ground of being an excise of duty."

Mr. Justice Fuller continues, saying that a tax on income and profits of land is manifestly a tax upon the very land itself. He

(14) Ante, p. 7.
(15) 157 U. S. 429, and 158 U. S. 601.
(16) Reported 157 U. S. 579.

perceives not how a tax upon real estate eo nomine can exist as such. The chief ingredient in the value of land is the beneficial interests in it; that in legal theory a grant of the profits of the land will carry the whole land with it. "Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate eo nomine. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of cases, and the rent and income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction."

The court established by its reasoning that land eo nomine and the profits and incomes issuing thereof are inseparable, at least for the purpose of taxation; and if a tax upon land is direct, a tax upon the income of it has the same effect, still maintaining that it considers the rule stare decisis. I must say, with regret, that I am unable to reconcile this, with the dictum so explicitly stated by Mr. Justice Patterson in the Hylton case, wherein he distinguishes land and profits thereof. "Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself. * * * When the produce is converted into a manufacture, it assumes a new shape; its nature is altered, its original state is changed, it becomes quite another subject, and will be differently considered."

In spite of the able and vigorous dissent by Messrs. Justices Harlan, Brown, Jackson, and White, the case, after a rehearing stands as an unprecedented precedent, insofar as a tax on the income of land and personalty, is a direct tax, and not an excise.

The cases which have been referred to show that until the income tax cases there existed in this country two (2) separate and distinct doctrines on the subject of direct taxation." One was the scientific or political-economic; the other, the historical or supreme court doctrine. For what reasons the same court turned from its former precedents, resorting to other authorities and adopting the views of economists is beyond my power to detect. All that can be perceived in examining the trend of reasoning of that tribunal is that there was a deviation without justification.

The court, however, before resting the case as res adjudicata, and possibly with the working effect it may have as a precedent to largely cripple the taxing power of the Federal government, has added the following dictum as a modification: "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments have assumed the guise of an excise tax and been sustained as such." Thus room was left under the Income Tax cases for a tax on "gains or profits from business, privileges or employments."

In the case of Nicol v. Ames,[17] the question again arose whether a tax evidenced by a stamp, upon each sale, or agreement of sale at any exchange or board of trade, is a direct or indirect tax. The case falling in the line of reasoning of the "succession tax" case, the court in distinguishing it from the Income Tax cases, reaches this conclusion—"In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be in-

(17) 173 U. S. 509, 516.

direct. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity, a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy." Continuing, Mr. Justice Peckham clearly reasons: "We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business and separate and apart from the business itself. It is not a tax upon membership therein, nor is it a tax upon sales generally."

Thus, it was held in Knowlton v. Moore,[18] that a tax on "Legacies and Distributive Shares of Personal Property" does not come within the category of direct taxes by excises. The court, again, points out the difference between a tax upon the rem directly, bearing immediately upon persons, upon the possession and enjoyment of rights; and when they are levied upon the happening of an event or exchange. Taxes of this general character, says Mr. Justice White, are universally deemed to relate, not to property eo nomine, but to its passage by will, or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession.

The doctrine of taxing privileges is most clearly laid down by our court of appeals in the case of State v. Dalrymple.[19] Judge McSherry, with his customary lucidness thus states: "Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing property actually located here, or personal property situated elsewhere, but owned by a resident, to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws, should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is that there shall be paid out of such property a tax * * * * into the treasury of the state. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated, to be transmitted by will or by descent or by distribution."

Sec. 30 of the Tariff Act of 1890,[20] reads, "That on and after the 1st day of January, eighteen hundred and ninety-one, the internal tax on smoking and manufactured tobacco shall be six cents per pound, and on snuff six cents per pound."

On June 13, 1898, congress passed an act to provide ways and means to meet the expenditures of the Spanish-American War,[21] which provides as follows: "That there shall, in lieu of the tax now imposed by law, be levied and collected, a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, for consumption or sale. Mr. Justice Brewer, in construing this act, after reviewing the various definitions given by the authorities to the term excise, says: "It is true other counsel in their brief have advanced a very elaborate and ingenious ar-

(18) 178 U. S. 41.

(19) 70 Md. 294, 299.
(20) 26 Stat. 619.
(21) 30 Stat. 448, Sec. 3.

gument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the Income Tax cases, but, as we have seen that the tax on manufactured tobacco is a tax on an article manufactured for consumption and imposed at a period intermediate the commencement of manufacture and final consumption of the article, it is not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use. It may be as Dr. Johnson said, "a hateful tax levied upon commodities," an opinion evidently shared by Blackstone, who says, after mentioning a number of articles that had been added to the list of those excised," a list which no friend to his country would wish to see further increased." But these are simply considerations of policy and to be determined by the legislative branch, and not of power to be determined by the judiciary. We conclude, therefore, that the tax which is levied by this act is an excise, properly so called."[22] * * *

In the case of Spreckles Sugar Refining Co. v. McClain,[23] it was argued on behalf of the plaintiff in error that Sec. 27 of the War Revenue is unconstitutional, because it imposes a direct tax not in accordance with constitutional requirements. The section provides, "That every person, firm, corporation, or company, carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special *excise tax* equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies, in their respective business in excess of said sum of two hundred and fifty thousand dollars."

Mr. Justice Harlan, in delivering the opinion of the court, says, "Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the act as 'a special excise tax,' and, therefore, it must be assumed, for what it is worth, that congress had no purpose to exceed its power under the Constitution, but only to exercise the authority granted to it of laying and collecting excises."

The court then proceeds to review its former decisions as applicable to the subject, and cites with favor the cases of Pacific Ins. Co. v. Soule, Veazie Bank v. Fenno, Scholey v. Chew, Nicol v. Ames, Knowlton v. Moore, and Patton v. Brady, wherein this general principle has been considered. Mr. Justice Harlan, who so ably dissented in the Income Tax cases, makes this retrospective comment: "In view of these and other decided cases, we cannot hold that the tax imposed on the plaintiff expressly with reference to its 'carrying on or doing the business * * * refining sugar' and which was to be measured by its gross annual receipts in excess of a named sum, is other than is described in the act of congress, a special excise tax, and not a direct one to be apportioned among the states according to their respective number. This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or re-examined. * * * It would subserve no useful purpose to do so. * * * It must suffice now to say that they clearly negative the idea that a tax here involved is a direct one, to be apportioned according the states according to number."

It was argued that regard must be had to the decision in the Income Tax cases, and the court answered that the precise

(22) Patten v. Brady, 184 U. S. 609, 619.
(23) 192 U. S. 397, 411.

question was not intended to be decided in those cases, quoting the opinion of the Chief Justice, wherein he left undecided the "instances in which taxation on business, privileges or employment has assumed the guise of an excise tax and sustained as such."[24]

In summing up from what has been said in these cases, the following principles may be considered as established:

First: That until the Income Tax cases, the only tax considered to be direct, was a capitation or a tax on land, all other taxes were indirect and not required to be apportioned.

Second: The decision in the Income Tax cases added the income of land and personalty as a subject of direct taxation, but not deciding the nature of a tax on business, privileges or employments.

Third: The Inheritance Tax cases, particularly the Spreckles Sugar Refining Co.'s case, decide what has been left undecided in the Income Tax cases, that a tax on business and privileges is not a direct tax but an excise.

Fourth: That the judiciary does not question the motives of congress and will consider a tax an excise if so defined in the act and measured by the amount of the gross receipts.

From the aforegoing principles, a conclusion may be reached that the present Corporation Tax Law, which requires every profit-making corporation to pay a special *excise tax*, with respect to the carrying on or doing business by such corporation equivalent to one per centum upon the entire net income, etc., may be taken for what it says, and not a direct tax subject to apportionment.

President Taft, in his message to congress urging the passage of the present Corporation Tax, says: "The decision of the Supreme Court in the case of Spreckles Sugar Refining Company v McClain seems clearly to establish the principle that such a tax as this is an excise tax upon privilege and not a direct tax on property, and is within the federal power without apportionment, according to population. This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from general partnership liability enjoyed by those who own the stock." And a joint stock company is regarded as a corporation for purposes of taxation.[25]

Assuming that the tax is an excise for the privilege of doing business, will it improperly interfere with the general power of the State to create corporations?

The same question was raised in the case of Veazie Bank v. Fenno,[26] where, under the act of July 13th, 1866, every national bank, state bank or state banking association, was required to pay a tax of ten per centum on the amounts of the notes of any state bank, or bank association, etc.

The point put to the court was, "Is a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the states from impairment by taxations, must be held to have no authority to lay and collect?" Mr. Chief Justice Chase thus answers it: "We do not say that there may not be such a tax. It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of congress. But it cannot be admitted that franchises granted by a state are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property."

Justices Nelson and Davis dissented from the court's opinion on the ground "That it

(24) 158 U. S. 601.

(25) Liverpool, etc., Ins. Co. v. Oliver, 10 Wall. 566.

(26) 8 Wall. 547.

is to the proper protection of the reserved rights of the states, that these powers and prerogatives, should be exempt from federal taxation, and how fatal to their existence, if permitted, and also, that even if this tax could be regarded as one upon property, still, under the decision above referred to, it would be a tax upon the powers and faculties of the states to create these banks, and, therefore, unconstitutional." This case was debated in the Senate as affecting the present Corporation Tax and received the sanction and support of the best constitutional scholars in that body. It clearly established the law on what is by the profession considered the most crucial point. It requires no further elaboration; for the principle so explicitly stated in the opinion, and the grounds of the dissenting justices, the proposition that the franchise of a corporation chartered by the state, not exercising the reserved powers of the state, is as properly subject to taxation as any other property. The relation of the state and the corporation, not chartered for governmental purposes, is purely contractual, and becomes property of its beneficiaries, which cannot be hampered with by the state creating it.[27] It is difficult to conceive how a tax on a contractual privilege between the state and the corporation would invade the *Jura summa imperii* of the state and thus destroy its power to create corporations.

If the federal government can tax the heir or distributee for the privileges of inheritance and distribution subject to local jurisdiction, why should it not by analogy possess the power to tax a corporation for the rights and privileges it enjoys as a corporate entity. It is true that the federal government cannot tax the judicial process, the salary of a state officer, or a railroad owned by a state, or a municipal corporation, for they are all agencies which carry into effect the sovereign powers of state government, as distinguished from corporations which are organized for purposes of a private or quasi public character, and who derive their existence of a contract executed by the legislature of the particular state. This proposition must be distinguished from the principle that the state has no power to tax a corporation incorporated by the federal government; for in those instances, a conflict arises between the state law and the supreme law of the land; the former that must yield, the latter that governs. Similarly, a tax imposed by congress on interest paid by corporations was sustained as an excise tax on their business, to be paid by them out of their earnings, income and profits.[28]

ISRAEL FREEMAN.

Oklahoma City, Okla.

(27) Dartmouth College Case, 4 Wheat.

(28) Railroad Co. v. Collector, 100 U. S. 595, 598.

## MASTER AND SERVANT—PERIOD OF EMPLOYMENT.

KELLER et al. v. WOLKARTE.

132 S. W. 506.

Court of Civil Appeals of Texas, November 23, 1910.

Defendant's agent testified that, when he employed plaintiff, he told him he should be paid $95 a month, and, if he gave satisfaction, the agent would keep him for a year, and that witness would be the judge of that. Held, that the evidence supported the conclusion that the employment was to be for a year, and that the employer did not reserve the right to terminate the same, regardless of substantial cause.

JAMES, C. J. The amended petition of Wolkarte alleged, in substance: That he had been employed by Theo Keller for a year as a cotton classer and otherwise in connection with Keller's business as a factor commission merchant and general dealer in cotton at $95 per month for the term of one year. That plaintiff worked in said capacity from July 25, to November 16, 1907, discharging his duties under the employment, on which latter date Keller discharged him without cause, and refused to pay him his salary beyond such date. That plaintiff has ever since

been willing and ready to serve as such employee, and has frequently tendered his services, but Keller persistently refused to accept same. That plaintiff has been unable to procure re-employment with the city, where he was serving when induced by Keller to make said contract, or other work, so that he has been wholly out of employment since said discharge. That plaintiff will not be able to procure employment or earn anything from any other source for the remainder of said term. That Theo Keller, the original defendant herein, has died, leaving a large estate descending to his heirs (naming them), residents of Harris county, who have received property far in excess of plaintiff's demand, and that no administration is necessary, no other claim than plaintiff's being outstanding. The answer was the general issue, incompetency of plaintiff, and adequate cause for discharge. The verdict was for plaintiff for $760.

There was ample evidence showing that the contract of employment was for the term of one year, and not one by the month. Furthermore, the evidence was not undisputed to the effect that plaintiff was to continue in Keller's service only so long as his services were satisfactory. For these reasons the first assignment of error is overruled.

The second assignment of error is that the following paragraph of the charge was error: "As to the defendant, the legal effect and purport of the contract was that he would pay plaintiff $95 a month from the 25th day of July, 1907, to the 25th day of July, 1908, and that if he discharged plaintiff in that time that it would be because he had good grounds for so doing; that is, that he would not discharge him so long as he performed the duties he had undertaken with that measure of skill and care which you are instructed in the preceding paragraph was obligatory upon the plaintiff." Plaintiffs in error cite the following testimony as showing that the charge was wrong: Wolkarte testified: "I had a conversation with Mr. Huey in which I was employed by Mr. Huey for Mr. Keller. I put in my resignation to the city, and went then and took the employment under Mr. Huey, and under the condition that I was to be there a year." B. S. Huey testified: "After telling him what his duties would be, I went to Mr. Keller, and he said he would leave it to me, so that, when I saw Mr. Wolkarte again, I told him I would pay him $95 a month, and, if he gave satisfaction, I would keep him for a year. I was to be the judge of it." The above testimony of Huey would not admit of a finding that a contract had been made terminable at the will of the employer. Said testimony that he was to "to be judge of it" had reference to and was in connection with the manner of plaintiff's performance of his duties, and the employer did not reserve the right, by simply declaring himself dissatisfied, to terminate the contract, regardless of substantial cause. This was the view correctly taken by the court in the portion of the charge which afterwards submitted the issue to the jury. There was no error in the portion of the charge complained of by the second assignment. The contract, according to said testimony, was in effect an engagement for a year.

The third assignment complains of the refusal of the following charge: After the court's general charge was read to the jury, the defendants requested the following special charge: "If you believe from the preponderance of the evidence that the plaintiff had a contract for employment for a period of one year, and if you further believe that the plaintiff was discharged without sufficient cause, then, after his discharge, it was the plaintiff's duty to exercise reasonable diligence and effort to obtain other employment he had the right for a reasonable time to seek employment in the same line of work in which he had been employed by the defendant, and after that, if he was unable to obtain such employment after reasonable diligence on his part, then it was his duty to seek any kind of employment that he was fitted to perform. You are, therefore, charged that if the plaintiff could, by the exercise of reasonable diligence, have obtained similar employment to that in which he was engaged by the defendants, which would have paid him as much as he would have received under the contract of employment with the defendants, then he is not entitled to recover anything in this suit." The first portion of the above instruction was in accord with the rule announced in Kramer v. Wolf, 99 Tex. 600, 91 S. W. 775. But the material part of the request and the instruction which appellants really sought was the latter part beginning with the: "You are therefore charged." This we find was substantially contained in paragraph sixth of the court's charge. The first portion was merely a preliminary statement of a rule of law, as an introductory basis for the latter portion. The assignment is therefore overruled.

The paragraph sixth of the charge of the court complained of by the fourth assignment was not erroneous. Nor was paragraph third complained of by the fifth assignment.

Affirmed.

NOTE.—*What is Secured to an Employee by a Clause that Employment Shall Continue During Specified Period if Work is Satisfactory?*—The rule is well understood that there must be, either expressly or by implication, some period fixed for employment to continue to prevent its being an employment at will, but where the period or term is fixed and it depends for continuance upon service being satisfactory to employer what is the status? There are a great number of cases on this subject, but there are many cases to the effect, that there is no merely indefinite time but the reservation of service being satisfactory is like a proviso. To bring the proviso into operation, then, dissatisfaction must be with service. Thus in Richardson v. School Dist., 38 Vt. 602, a stipulation that a teacher "should leave, if the school was not satisfactory," gave no right to discharge her for personal unpopularity in the district or for any other reason than dissatisfaction with her school.

So in Teichner v. Pope Mfg. Co., 125 Mich. 91, 83 N. W. 1031, where employment might be terminated for "conduct unsatisfactory to the officers of the company or other cause," the case turned on "for other cause" and this language was held broad enough to cover the case of defendant wanting a more experienced man, but the opinion goes upon the theory, that the discharge would not have been justified because it was desired to employ another man of presumably the same capability.

So in Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943, it was held in effect that where an employee was required to give a bond and he failed to do so, failure did not justify discharge when he had been employed with employment to continue so long as he discharges his duties "to the employers' satisfaction."

Further illustration in regard to the satisfaction clause not converting such a contract into a mere employment at will is found in the case of Winship v. Base Ball, etc., Assn., 78 Me. 571, 7 Atl. 706, discharge for refusal to submit to reduction of salary does not terminate contract of hiring. And in Atlanta Stove Works v. Hamilton, 83 Miss. 704, 35 So. 763, employer's desire to withdraw from territory in which plaintiff was salesman gave no excuse for terminating the employment.

In Gwynn v. Hitchner, 67 N. J. L. 54, 52 Atl. 997, it is laid down broadly that: "In order to legalize the discharge before expiration of term of service, two elements must be present: First, the employers must have been dissatisfied with his work; and the dissatisfaction must have been the cause of the discharge." There are other cases recognizing this rule, and they diverge only on the question as to whether there was any cause for dissatisfaction, but the weight of authority appears to be that it is sufficient, if the employer is in good faith acting upon actual dissatisfaction as his reason for discharge. Thus see Koll v. Bush, 6 Colo. App. 294, 40 Pac. 579; Ill. C. R. Co. v. Ely, 83 Miss. 519, 35 So. 873; Frary v. Am. Rubber Co., 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644.

In New York there are many cases on this subject and as seen by the two next cited, construction appears to lean in favor of the absoluteness of the contract where a term is mentioned.

A prior New York case is somewhat like that of Mason v. Produce Exchange, *infra*. See Sabin v. Mix, 55 N. Y. Sup. 840, 36 App. Div. 443. In this case the plaintiff was to travel and sell goods for a year with employer "to pay him at the rate of $1,500 per year for the time engaged in their service, providing the expense of selling by him does not exceed 8 per cent of his net sales," the employer to pay all legitimate traveling expenses. Plaintiff was discharged during the year. The court said: "Defendant contends that the contract was conditional upon the expense of selling not exceeding 8 per cent of plaintiffs net sales, and that, if they exceeded that amount, the defendant could at any time terminate his employment. We think * * * the proviso does not constitute a condition precedent to the plaintiff's right to continue in employ of the defendant. * * * It may be that at the end of each trip, or at the end of the year, the defendant might have had an accounting," and there be a proportionate reduction of salary, but under the facts it was held unnecessary to decide this question because the proof on this subject was lame.

In the case of Mason v. N. Y. Produce Exchange, 111 N. Y. S. 163, 127 App. Div. 282, affirmed by Court of Appeals, 196 N. Y. 548, 89 N. E. 1104, the accepted offer of employment was the appointment of plaintiff as "Chief Engineer of the Exchange, with house rent in the building free at a salary of $2,500 for the first year," and, "if your services prove satisfactory to the authorities of the Exchange, your remuneration for the second year and thereafter will be $3,000 per annum," the facts show that plaintiff served one full year at $2,500, a second year at $3,000 and was discharged in the middle of the third year. He was held by the appellate division, reversing the trial court, entitled to recover for one-half year less his earnings. The court held there was an employment from year to year, saying: "The defendant contends that the words 'if your services prove satisfactory,' etc., apply to the term of hiring and gave the defendant the right to discharge the plaintiff at any time if his services were not satisfactory. This contention cannot be sustained. The words quoted apply only to the amount of compensation to be paid after the first year."

There are cases which hold that though the promise to keep in employment an employee a definite time is indicated, yet the employment is not for such time, if the employee does not bind himself to continue in such service for that time. The hiring is at will, because there is no mutuality in the promise.

An interesting case on this line is that of St. Louis I. M. & So. Ry. Co. v. Matthews, 64 Ark. 398, 42 So. 902, 39 L. R. A. 467, where employment was under agreement with a labor union that an engineer should not be discharged without cause, it being held that thereby engineers do not themselves agree to serve for any fixed time, but these cases are somewhat apart from our inquiry at this time.

This subject appears to present a variety of decision, and those cases most favorable towards giving tangible value to a contract, where its continuance is conditioned on services being satisfactory to employer, really make it of little more actual value than mere employment at will.

C.

## CORAM NON JUDICE.

ALBERT T. PATRICK.

Some defeated litigants never admit defeat, and frequently desire to retry their case before the public. This is especially true in cases of convicted homicides, of whom Mr. Albert T. Patrick of New York, convicted of the murder of William M. Rice, is no exception.

Mr .Patrick is sending out broadcast blank petitions for signatures, addresses, to the governor of New York to pardon the convicted man, and he accompanies the petition with a full review of his case and some deductions of certain medical societies on special phases of his case, all in his favor, and intended to cause a reversal of the judgment in the court of last resort but usually ineffectual result—public opinion.

While many tender and unreasoning people sign such petitions, the more enlightened citizen refuses to intervene, not because wanting in sympathizing, but because he keeps ever prominent the interest of the state and the maintenance of public order.

This is true: No man concerned with the issue of his own private concerns can expect to arrive at any more satisfactory result as to the guilt or innocence of one accused of crime than a court and jury which not only hears all the evidence but sees all the witnesses face to face and can thus give the evidence its proper worth.

If such further appeals are to be encouraged they should be addressed to some board of pardons specially created for that purpose and not to public opinion. The public very properly refuses to interest itself in such appeals.

## BOOK REVIEWS.

COMPENDIUM OF MEXICAN LAW.

Mr. Joseph Wheless, of St. Louis Bar, has published in English, a Compendium of the Laws of Mexico. This compendium is duly authorized by the president of the republic of Mexico under Art. 1166 of its civil code which provides that for such a publication to be the subject of copyright, the editor must use the authentic text of laws officially published by consent of the government. Mr. Wheless desiring copyright, applied for and obtained this consent.

This compendium essays to present to the English-speaking business man, investor and capitalist as well as the lawyer desiring acquaintance with Mexican law whatever of Mexican law may be important to foreign interests in that republic.

The translation is not put forward as literal, because his work is "an abridgement or compendium," except in some instances, as for example "the Federal constitution is translated in full and literally," "so far as to be literal in a translation is possible." There are many other parts of original matter translated literally where deemed necessary. In abridging, the author assures his readers that the substance of Mexican law is always given, and merely immaterial details are omitted.

Mr. Wheless gives assurance, based on his knowledge of the Spanish language, that his translations are faithful.

The two volumes aggregating 1,048 pages are divided into 24 books with their titles, chapters and articles, which make up a table of contents so thorough and readily serviceable as to dispense with any need of an index, the final book being composed of documents and forms in most general use in Mexico. Of these we have the Spanish text followed by its English translation.

This compendium has its own section numbering and its own individual arrangement, but bracketed references show where what the translation embodies in substance may be found if desired.

To show the reduction made in volume of original text it may be noticed all through the compendium that one of its "articles" embraces two or more of those of the Mexican codes—a suggestion that tends to show the author must have devoted much time and thought—not only in selection of his material but also in bringing it down to workable size.

This process makes the author responsible for the literary style and accuracy of the diction of the work, and entitles him to all credit for success in these particulars.

The book bears evidence of painstaking and zeal in the production of what should prove a valuable production for a great number of people in this country and those of our countrymen who are in the republic because of the lure its wonderful natural riches and progressive business hold out.

The volumes are bound in law buckram, with typography and other features excellent, and are published by F. H. Thomas Law Book Co., St. Louis. 1910.

## HUMOR OF THE LAW.

A white man during reconstruction times was arraigned before a colored justice of the peace for killing a man and stealing his mule. It was in Arkansas, near the Texas border, and there was some rivalry between the states, but the colored justice tried always to preserve an impartial frame of mind.

"We's got two kinds ob law in dis yer co't," he said: "Texas law an' Arkansas law. Which will you hab?"

The prisoner thought a minute and then guessed that he would take the Arkansas law.

"Den I discharge you fo' stealin' de mule, an' hang you fo' killin' de man."

"Hold on a minute, Judge," said the prisoner. "Better make that Texas law."

"All right. Den I fin' you fo' killin' de man, an' hang you fo' stealin' de mule."

A verdict was rendered in circuit court at Bowling Green, Kentucky, that was full of humor, and produced a roar of laughter in the court room. H. F. Richmond, who had swapped horses with L. M. Butler, sued him for $75, alleging breach of warranty, introducing evidence that the horse was unsound and to prove that the horse was a "stump sucker." Butler filed a counterclaim, and set up that the horse gotten from the plaintiff had fits.

After only a few minutes in the jury room the jury returned the following verdict:

"We, the jury, find that this is a case of hoss and hoss, that neither the plaintiff nor defendant is entitled to recover damages, and that each shall pay his own costs in this cause expended."

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Attorney and Client**—Validity of Contract.—A contract between a claimant against a railroad company for personal injuries and attorneys, whereby the latter were to receive half the amount recovered, held binding on the company, it having knowledge thereof before settlement with claimant.—St. Louis & S. F. R. Co. v. Dysart, Tex., 130 S. W. 1047.

2. **Abatement and Revival**—Pendency of Action.—That the pendency of an action constitute a bar to another subsequently commenced, it must appear that the question presented in the second action is the same as that involved in the first.—Williams v. Board of Com'rs. of Rout County, Colo., 111 Pac. 71.

3. **Assignments**—Priority.—The holder of a partial assignment of a chose in action, to which the debtor has not assented, is not entitled to priority over a subsequent assignee for value and without notice of the entire chose in action.—King Bros. & Co. v. Central of Georgia Ry. Co., Ga., 69 S. E. 113.

4.——Other Action Pending.—Creditor, having brought suit at law against several debtors, cannot, pending such action, maintain suit to cancel fraudulent conveyance from one debtor to the other.—Cunningham v. J. P. Williams Co., Ga., 69 S. E. 101.

**Action**—Assault on Passenger.—A passenger, unjustifiably assaulted by a street car conductor, may sue either in tort or for violation of the contract of carriage.—Jackson v. Old Colony St. Ry. Co., Mass., 92 N. E. 725.

6. **Banks and Banking**—Duplicate Check.—A duplicate check having been executed by the drawer directing payment of the same sum as the original "if previous check" was unpaid, held to make the bank liable to the payee for the amount thereof.—Southern Seating & Cabinet Co. v. First National Bank, S. C., 68 S. E. 962.

7. **Bills and Notes**—Burden of Proof.—In an action on a promissory note, the denial in the answer of the allegation in the petition as to the consideration of the note placed the burden upon plaintiff of proving that the consideration was as alleged.—Star Mills v. Bailey, Ky., 130 S. W. 1077.

8.——Material Alteration.—Filling a note, having a blank for the rate of interest, after delivery, so as to make it bear 8 per cent. interest from date, held a material alteration.—First Nat. Bank v. Merkel, Miss., 53 So. 350.

9.——Bona Fide Purchasers.—Notes and mortgages procured by fraud held unenforceable in the hands of a bona fide holder; it appearing that the maker was free from negligence.—First Nat. Bank of Watonga v. Wade, Okl., 111 Pac. 205.

10. **Bankruptcy**—Adjudication Against Partner.—Adjudication of member of a firm as bankrupt held not to defeat an attachment on the firm property levied within four months before the adjudication by a firm creditor.—American Steel & Wire Co. v. Coover, Okl., 111 Pac. 217.

11.——Action by Trustee.—The court in an action in trover held not authorized to substitute the trustee in bankruptcy as party plaintiff in place of the assignee of the bankrupt, but it should permit the trustee to prosecute the action in the assignee's name.—Bacon v. George, Mass., 92 N. E. 721.

12. **Brokers**—Commissions.—In an action for broker's commissions, it was immaterial that the oral negotiations between the broker and his customer were merged in their written contract.—Forsythe v. Allbright, Mo., 130 S. W. 1126.

13. **Cancellation of Instruments**—Fraudulent Representation—The rule that a note and mortgage duly executed will not be set aside for misrepresentations as to their contents unless the testimony is clear and convincing held to contemplate that the testimony for the party seeking relief is unequivocal.—Colorado Inv. Loan Co. v. Beuchat, Colo., 111 Pac. 61.

14. **Carriers**—Ejection of Passenger.—Ejection of a passenger before his destination was reached on the theory that the train did not stop there held unlawful, if the rule had been habitually violated, or he was induced to believe the train would stop.—Missouri, K. & T. Ry. Co. of Texas v. Herring, Tex., 130 S. W. 1039.

15.——Injury to Passenger.—A street car passenger, who was directed to change cars at a car barn, could assume that the way he took to board the other car was safe.—Gurley v. Springfield St. Ry. Co., Mass., 92 N. E. 714.

16.——Injury to Passenger.—Railway company held not liable for injuries to passenger in boarding a car from starting of car on signal of unauthorized passenger.—Cohen v. Philadelphia Rapid Transit Co., Pa., 77 Atl. 500.

17.——Carriage of Goods.—Diligence required of a common carrier to preserve goods in the course of transportation from loss by fire is not limited to avoid setting fire to such goods, but extends also to preserving them from destruction after a peril from fire has became apparent.—Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co., Ga., 68 S. E. 1039.

18.——What Law Governs.—A contract with a carrier requiring suit for injuries to one accompanying a shipment of stock to be brought within a specified time affects only the remedy, and is governed by the law of the forum.—St. Louis & S. F. R. Co. v. Dysart, Tex., 130 S. W. 1047.

19. **Certiorari**—Existence of Other Remedy.—A contractor with a municipality for the erection of a sewage disposal plant held not entitled to bring certiorari to review the passage of a subsequent ordinance providing for new plans, notwithstanding the federal and state Constitutions, prohibiting the passage of laws impairing the obligation of a contract.—Wormser-Goodman Const. Co. v. Borough of Belmar, N. J., 77 Atl. 466.

20. **Champerty and Maintenance**—Deed to Land in Adverse Possession.—A deed is champertous as to land inclosed by a fence and in adverse possession of a third person.—Tool v. Kinman, Ky., 130 S. W. 1073.

21. **Chattel Mortgages**—Validity as to Third Persons.—A chattel mortgage, filed without

the affidavit required is void as to subsequent purchasers in good faith.—Coeling v. Green, Mich., 127 N. W. 792.

22.——Conversion.—A chattel mortgagee, selling the mortgaged chattels and appropriating the proceeds held guilty of conversion.—Anderson v. Joseph, Ark., 130 S. W. 165.

23. **Contempt**—Attempt to Bribe Juror.—Where a third person attempted to bribe a juror during a criminal proceeding, he could be immediately tried before the jury, irrespective of its effect on the trial of the principal case.—Turpin v. Commonwealth, Ky., 130 S. W. 1086.

24. **Contracts**—Building Contracts.—Where, on a contractor's default, the owner gave notice of election to enter and complete the contract, the contractor was entitled to recover the difference between the contract price and the cost to the owner of completing the work.—Fraenkel v. Friedmann, N. Y., 92 N. E. 666.

25.——Consideration.—A promise to be enforceable must be based on a consideration and must be put in such form as to be available under the rules governing contracts and the admission of evidence relating thereto.—Adams v. Gillig, N. Y., 92 N. E. 670.

26.——Performance. — Conditions rendering performance of a contract impossible held not to terminate the contract ad initio and vitiate what has been done and what remains to be done that is capable of execution.—Kinzer Const. Co. v. State, 125 N. Y. Supp. 46.

27. **Corporations**—Assessments.—An assessment on corporate stock can be levied only on a strict compliance with the charter and statutory provisions relative thereto.—Cheney v. Canfield, Cal., 111 Pac. 92.

28.——Board of Directors.—A corporate board of directors must act as a board in order to bind the corporation; their acts not being its acts unless done according to law.—Star Mills v. Bailey, Ky., 130 S. W. 1077.

29.——Dividends.—There is no legal distinction between distribution of corporate stock as a dividend and distribution of the equivalent in money.—Kimball v. Success Mining Co., Utah, 110 Pac. 872.

30.——Grounds for Appointing Receiver.—That one has fraudulently obtained control of a corporation and is dissipating its assets is ground for appointing a receiver for it.—Kennedy Drug Co. v. Keyes, Wash., 111 Pac. 175.

31.——Criminal Prosecution.—In a prosecution of a corporation, its corporate existence may be shown, though not charged in the indictment.—State v. Rowland Lumber Co., N. C., 69 S. E. 58.

32.——Pleadings.—In an indictment of a corporation, allegation that it is a corporation is necessary.—Madisonville, H. & E. R. Co. v. Commonwealth, Ky., 130 S. W. 1084.

33.——Promoters.—A promoter of a corporation held not entitled to damages from the corporation because it defeated profits he would have made by a sale of land to it at an exorbitant price.—Mangod v. Adrian Irr. Co., Wash., 111 Pac. 173.

34.——Right to Sue.—In an action by a foreign corporation on a contract to raise the objection that plaintiff has not complied with General Corporation Law upon motion to dismiss after the evidence is in, it must appear that the contract sued upon was made by plaintiff in the state.—American Case & Register Co. v. Griswold, 125 N. Y. Supp. 4.

35. **Contribution**—Joint Wrong Doer.—One joint wrongdoer has no right to contribution from another, in case of recovery by the injured party, where the party seeking contribution is morally, as well as legally, at fault.—Texas & P. Ry. Co. v. Corr, Tex., 130 S. W. 185.

36. **Courts**—State Practice.—A trustee in bankruptcy, who sues in a state court, held bound by the rules of procedure in the state court.—Lacon v. George, Mass., 92 N. E. 721.

37. **Criminal Law**—Corporations.—A corporation charged with crime is, like a natural person, presumed to be innocent until proved guilty.—State v. Northern Pac. Ry. Co., Mont., 111 Pac. 141.

38.——Former Indictment.—Accused may show a previous acquittal or conviction of the offense charged, but not that there is a former indictment pending.—Madisonville, H. & E. R. Co. v. Commonwealth, Ky., 130 S. W. 1084.

39.——Unlawful Acts.—Agency for another is no defense of an unlawful act.—Commonwealth v. Bottom, Ky., 130 S. W. 1091.

40.——Writ of Error.—Alleged error in refusing to quash an indictment cannot be presented for review by motion for new trial.—Bryant v. State, Ga., 69 S. E. 121.

41. **Deeds**—Cancellation.—A statement of a grantee inducing the execution of a deed to him held a statement of a material existing fact justifying a cancellation of the deed because false.—Adams v. Gillig, N. Y., 92 N. E. 670.

42.——Mistake.—That a husband, who conveyed property to his wife for her support after his death, did so because he believed he would predecease her, in which he proved to be mistaken, was not the kind of mistake for which the courts will set aside the conveyance.—Bartley v. Knott, Ky., 130 S. W. 1096.

43. **Execution**—Estates in Remainder.—A contingent remainderman's interest cannot be sold under execution against him during the life of the precedent estate, but a vested remainderman's can.—Walker v. Alverson, S. C., 68 S. E. 966.

44. **Ejectment**—Allegation of Title.—Plaintiff in ejectment need not deraign his title in his complaint, but, under the allegations of ownership, may prove such title as he has.—Consolidated Gold & Sapphire M'ning Co. v. Struthers, Mont., 111 Pac. 152.

45. **Equity**—Relief Against Fraud.—Equity will interfere to grant relief where necessary to prevent the consummation of a fraud.—Adams v. Gillig, N. Y., 92 N. E. 670.

46. **Election of Remedies**—Inconsistency of Alternative Remedies.—An election of remedies made wth knowledge of the facts between coexisting remedies which are inconsistent is a bar to any action based on a remedy inconsistent with that asserted by the election.—Williams v. Board of Com'rs of Routt County, Colo., 111 Pac. 71.

47. **Eminent Domain**—Rights of Abutting Owners.—Abutting owners on a village street held not entitled to recover for disturbance of their rights of light, air, and access by imposition of a new street use.—Carswell v. Hudson Valley Ry. Co., 125 N. Y. Supp. 24.

48. **Executors and Administrators**—Partial Distrbution.—A decree of partial distribution can be made only on the petition of an heir, devisee, or legatee, and not on the petition of the administrator.—Alcorn v. Gieseke, Cal., 111 Pac. 98.

49.——Liability of Administrator.—Where an administrator without authority of law carries on the business for the deceased, he is chargeable with all the losses incurred.—Western Newspaper Union v. Thurmond, Okl., 111 Pac. 204.

50.——Liablity of Bidder at Sale.—Where the highest bidder fails to comply with a judgment of sale, the court at the instance of the parties to the action held authorized to confirm the sale, and hold the bidder liable for any loss on a resale.—Blakeley's Adm'x v. Hughes, Ky., 130 S. W. 1067.

51. **Evidence**—Oral Restrictions.—An oral restrictive covenant or any oral promise to do or refrain from doing something affecting the real estate about which a contract is made held not enforceable.—Adams v. Gillig, N. Y., 92 N. E. 670.

52.——Failure to Call Witness.—The failure of a party having the burden of proving a certain transaction to call a witness who participated with him therein, or to explain his failure to do so, will justify an inference that such witness would not have sustained him.—Star Mills v. Bailey, Ky., 130 S. W. 1077.

53. **False Imprisonment**—Knowledge of Arrest.—In an action for malicious prosecution, defendant held entitled to show that he did not know that an execution had been issued by his attorney against plaintiff's person, and that he was not responsible for plaintiff's arrest.—Harding v. Evans, 124 N. Y. Supp. 897.

54. **Fraud**—Knowledge and Intent.—Due diligence to ascertain the truth in regard to statements made as of matters of fact within one's own knowledge is not enough to relieve the maker of them from liability, if they are false and are relied upon as true, and the person to whom they are made suffers loss thereby.—Huntress v. Blodgett, Mass., 92 N. E. 427.

55. **Frauds, Statute of**—Leases.—A subsequent contract changing any of the terms of a written lease of realty for more than one year required by the statute of frauds to be in writing must also be in writing.—Beard v. A. A. Gooch & Son, Tex., 130 S. W. 1022.

56.——Original Undertaking.—The statute of frauds held not to apply to an original undertaking, though the benefit accrues to another than the promisor.—Gainesville & Alachua County Hospital Ass'n v. Hobbs, N. C., 69 S. E. 79.

57. **Fixtures**—Rights of Licensee.—If a licensee erects building and improvements on land for his own use, he has a right to remove the same, and they remain his personal property, and he must be given a reasonable time for their removal.—Joplin Supply Co. v. West, Mo., 130 S. W. 156.

58. **Gaming**—Gambling Contract.—Where a contract is assailed as founded on an illegal consideration, and as having been made in contravention of public policy, the form of the contract is not conclusive in determining its validity.—G. G. Edgerton & Son v. J. T. Edgerton & Bro., N. C., 69 S. E. 53.

59. **Homestead** — Possession of Widow. — Where a widow occupies the homestead as a home by order of the probate court, the same is not liable to partition at suit of the heirs of the deceased husband.—Holmes v. Holmes, Ok., 111 Pac. 220.

60. **Husband and Wife**—Contractual Capacity of Wife.—A wife may now make an enforceable contract with her husband to the same extent as with third persons.—Abbott v. Fidelity Trust Co., Mo., 130 S. W. 1120.

61. **Injunction**—Cutting Timber.—The measure of loss to one party and the advantage to the other by granting or refusing injunctive relief has its proper influence in determining the relief to be administered in equity, except in cases controlled by some positive statutory enactment.—Taylor v. Riley, N. C., 69 S. E. 68.

62. **Innkeeper**—Baggage.—Where an innkeeper's agent receives baggage checks from a guest, the innkeeper is bound either to account for the baggage or return the checks.—Keith v. Atkinson, Colo., 111 Pac. 55.

63. **Insane Persons**—Inquisition.—An alleged incompetent, in the absence of express contract, held not liable for services of an unofficial stenographer in proceedings to have him declared an incompetent, except on an implied contract.—Carpenter v. Hammond, 125 N. Y. Supp. 31.

64. **Intoxicating Liquors**—Unlawful Sale.—A sale of whisky in a local option town by a saloon keeper of another town, completed by personal delivery by his barkeeper, constitutes an offense by the saloon keeper.—Commonwealth v. Bottom, Ky., 130 S. W. 1091.

65. **Judgment**—Arrest.—A motion in arrest for an insufficient complaint will not be sustained where the complaint discloses facts sufficient to bar another action, and its defects might have been supplied by proof.—Ginther v. Rochester Improvement Co., Ind., 92 N. E. 698.

66.——Collateral Attack.—A notice of publication, in an action against plaintiff's grantor to quiet title, naming defendant therein as "Andrew V. Johnson," was sufficient on collateral attack of the judgment quieting title by plaintiff, though the record showed title to be in "Andrew U. Johnson" when plaintiff purchased in good faith, so that the judgment bound him.—Hungate v. Hetzer, Kan., 111 Pac. 183.

67.——Judgments on Pleadings.—On motion for judgment on the pleadings, the complaint must be searched as on demurrer.—McCarthy v. Heiselman, 125 N. Y. Supp. 13.

68.——Want of Jurisdiction.—Where a court does not have jurisdiction of the subject-matter and of the parties, the adjudication is void, and may be assailed collaterally.—Torrey v. Bruner, Fla., 53 So. 337.

69. **Landlord and Tenant**—Care of Premises.—A landlord of a lodging house, who retains possession and control of the hallways for use in common by tenants, must maintain them in the condition they were in at the time of the letting to a tenant.—Faxon v. Butler, Mass., 92 N. E. 707.

70. **Larceny**—Grades of Offense.—The same transaction may constitute both simple larceny and larceny after trust, and the offender may be prosecuted for and convicted of either offense.—Bryant v. State, Ga., 69 S. E. 121.

71. **Limitation of Actions**—Partial Payment. —A partial payment on a note, either by the principal or by a surety, before the note is barred by limitation, does not constitute a new point for the running of the statute as against a cosurety, not a party to the payment.—McLin v. Harvey, Ga., 69 S. E. 123.

72. **Mandamus**—Recovery of Property.—Mandamus will not lie against officers to compel a surrender of property seized without statutory authority.—Guyton v. Neal, Colo., 111 Pac. 84.

73.——Adequacy of Other Remedy.—Where a statute prescribes no remedy for refusal to perform a duty made imperative thereby, or in case of doubt whether there is another effectual remedy, mandamus is the proper remedy.—Bell v. Thomas, Colo., 111 Pac. 76.

74. **Marriage**—Previous Marriage. — Intentional concealment by decedent, on marrying plaintiff, that a previous marriage was still in force, was a fraud on him, for which during her lifetime he could have maintained a petition to annul the marrage.—Batty v. Greene, Mass., 92 N. E. 715.

75. **Master and Servant**—Dangerous Occupation.—A servant is entitled to rely on the superior knowledge of his master and act as directed, unless the danger is such that a man of ordinary prudence would discern the same, and refuse obedience.—Larsen v. Magne-Silica Co., Cal., 111 Pac. 119.

76.——Defective Staging.—A loose staging constructed by carpenters along the side of a car they had been repairing, and later used by plaintiff in painting the car, held not a part of the railroad company's ways, works, and machinery, within the employer's liability act, for defects in which the railroad company would be liable.—Nichols v. Boston & M. R. R., Mass., 92 N. E. 711.

77. **Mines and Minerals**—Mining Claims.—Discovery of a mining claim vests in the discoverer a prior right to complete his location within a reasonable time.—McCleary v. Broaddus, Cal., 111 Pac. 125.

78. **Mortgages**—Record.—A subsequent mortgagee without notice of an antecedent mortgage takes a superior lien by recording his mortgage first.—Brown v. Sartor, S. C., 69 S. E. 88.

79.——Quantum of Proof.—In order to sustain a bill to have an absolute deed declared a mortgage, the proof must be beyond a reasonable doubt.—Baird v. Baird, Colo., 111 Pac. 79.

80. **Municipal Corporations**—Presumptions.—Where a private consumer of electricity was injured while turning on an electric light, a presumption of the company's negligence arose. —Abrams v. City of Seattle, Wash., 111 Pac. 168.

81.——Public Improvements.—A city can create a valid municipal lien for improving a street only where the improvement is made as provided by statute.—Morrow v. Barber Asphalt Paving Co., Okl., 111 Pac. 198.

82.——Street Improvements.—Since exercise of a city's power to burden property with the cost of street improvements affects individual rights, the provision of the manner of obtaining jurisdiction is mandatory.—Brownell Improvement Co. v. Nixon, Ind., 92 N. E. 693.

83. **Negligence**—Last Clear Chance.—The last chance doctrine applies where plaintiff's danger might have been discovered by ordinary care, as well as where it was actually dis-

covered.—Edge v. Atlantic Coast Line R. Co., N. C., 69 S. E. 74.

84. **Parent and Child**—Liability for Torts of Child.—Generally at common law a parent is not liable for the torts of his child without some participation on his part in the unlawful act.—McCarthy v. Heiselman, 125 N. Y. Supp. 13.

85. **Partition**—Improvements by Co-Tenant. —In partition among co-tenants, the court may award compensation to one of them for valuable improvements made by him upon the land in good faith.—McKelvey v. McKelvey, Kan., 111 Pac. 180.

86. **Pleading**—Demurrer to Answer.—A demurrer to an answer tests the sufficiency of the complaint as well as the answer.—Ginther v. Rochester Improvement Co., Ind., 92 N. E. 698.

87.——Negligence.—Where an allegation of general negligence is followed by allegations of specific negligence, the latter furnish the only ground of recovery.—Barnett v. Star Paper Mill Co., Mo., 130 S. W. 1121.

88. **Principal and Agent**—Power of Attorney. —A power to sell land subject to approval by the grantors authorizes a conveyance only for a pecuniary consideration approved by them.—Alcorn v. Gieseke, Cal., 111 Pac. 98.

89. **Principal and Surety**—Contribution.—Ordinarily one surety cannot recover contribution from another, when the debt paid by the surety seeking contribution was not binding either on the principal or on the other surety.—McLin v. Harvey, Ga., 69 S. E. 123.

90. **Priorities**—Liens.—At common law priority of liens were fixed by the time the liens attached, but a different rule as to priority may be fixed by statute respecting statutory liens. —Brownell Improvement Co. v. Nixon, Ind., 92 N. E. 693.

91. **Prohibition**—Existence of Remedy by Appeal.—Prohibition will not lie where an inferior court erroneously grants an injunction; an appeal lying to the Supreme Court.—Pioneer Telephone & Telegraph Co. v. City of Bartlesville, Okl., 111 Pac. 207.

92. **Railroads**—Rights in Streets.—Railroads, having accepted charters under laws expressly reserving to the Legislature the right to alter, modify, or repeal, held bound by a subsequent act requiring the elevation or depression of tracts in a street.—Long Island R. Co. v. City of New York, N. Y., 92 N. E. 681.

93.——Rights of Licensee.—A mere licensee on station grounds held to take them as he finds them.—Woods v. Missouri Pac. Ry. Co., Mo., 130 S. W. 1123.

94. **Reformation of Instruments**—Matters Subject to Reformation.—Where, by mistake or otherwise, an oral agreement forming a part of the transaction involving the sale of land is omitted from the writing, it can only be made effective by a reformation of the writing.—Adams v. Gillig, N. Y., 92 N. E. 670.

95. **Sales**—False Representations. — False representations, calculated to induce one to make a contract, held presumed to have been relied on.—Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co., Cal., 111 Pac. 121.

96.——Rescission.—A buyer seeking to rescind on a certain ground held not entitled to urge another ground.—American Case & Register Co. v. Griswold, 125 N. Y. Supp. 4.

97. **Seduction**—Elements of Offense.—To constitute seduction, accused need not be a single man.—Commonwealth v. Tobin, Ky., 130 S. W. 1116.

98. **Subrogation**—Vendors Lien. — Persons who paid to the vendor of land the amount of the unpaid purchase money are entitled to be substituted to his lien for such amount.—Bartley v. Knott, Ky., 130 S. W. 1096.

99. **Taxation**—Tax Sale.—Where the price bid is greatly disproportionate to the value of the property, but slight additional circumstances tending to show fraud or unfairness are necessary to require the sale to be vacated.—Spence v. Commonwealth, Ky., 130 S. W. 1113.

100. **Telegraphs and Telephones**—Nature of Corporation's Duty.—A telephone corporation is a quasi public corporation, and bound, at common law, to serve the public without partiality or discrimination.—Vaught v. East Tennessee Telephone Co., Tenn., 130 S. W. 1050.

101. **Tenancy in Common**—Payment of Taxes.—A co-tenant having paid taxes on the common property held entitled to foreclose a lien only for the proportion chargeable against the interests of his co-tenants.—Anderson v. McGee, Tex., 130 S. W. 1040.

102. **Theaters and Shows**—Injuries to Persons Attending.—Lessee of a building leased for amusement purposes is required to exercise only reasonable care as to purchasers of tickets.—Greene v. Seattle Athletic Club, Wash., 111 Pac. 157.

103. **Time**—Directors' Meetings.—A corporate board of directors held not entitled to hold a regular meeting on the day following the appointed day which fell on a holiday.—Cheney v. Canfield, Cal., 111 Pac. 92.

104. **Torts**—Intent.—In civil actions for wrongs, the intent of the party charged with the wrong is frequently of controlling effect on the conclusion to be reached in the action. —Adams v .Gillig, N. Y., 92 N. E. 670.

105.——Malicious Injury to Business.—Where defendants notified their employes not to trade with plaintiff on pain of dismissal, resulting in loss to plaintiff, he was entitled to recover the damages sustained.—Wesley v. Native Lumber Co., Miss., 53 So. 346.

106. **Trial**—Agreed Statement of Facts.— Where a case is submitted on an agreed statement of facts, no inferences can be drawn from the facts; but the question is whether they entitle plaintiff, as a matter of law, to a judgment.—Friedman v. Jaffe, Mass., 92 N. E. 724.

107. **Trover and Conversion**—Elements.—Evil intent is not the essence of conversion which may result from the exercise of an unlawful dominion over the personalty in good faith.— McCarthy v. Heiselman, 125 N. Y. Supp. 13.

108. **Trusts**—Fraud.—If one procures the legal title to property from another by fraud, misrepresentation, or concealment, equity will convert him into a trustee.—Batty v. Greene, Mass., 92 N. E. 715.

109.——Resulting Trusts.—At common law, where the consideration for land was paid by one person and the title taken to a third, being a stranger in relation to the one paying the consideration, the person taking the title held it in trust for the one making the payment.—Wright v. Yates, Ky., 130 S. W. 1111.

110. **Vendor and Purchaser**—Release of Vendor's Lien.—The release of a vendor's lien by the holder of a note secured by the lien vests the legal title in the original vendee.—Atteberry v. Burnett, Tex., 130 S. W. 1028.

111.——Tender of Deed.—Tender of a deed under a bond for a deed held not prerequisite to suit by the vendor for defaulted payments less than the total sum agreed to be paid.—Ginther v. Rochester Improvement Co., Ind., 92 N. E. 698.

112. **Wills**—Election by Insane Person.—If an insane devisee was entitled to elect to take under the will or by descent, the court will elect for him to renounce the will upon application made by his committee, if beneficial to him.—Harding's Adm'r v. Harding's Ex'r., Ky., 130 S. W. 1098.

113.——Probate.—The probate of a will is a proceedings in rem; the character of the notice required being prescribed by statute, and the rem being the will.—Torrey v. Bruner, Fla., 53 So. 337.

114. **Witnesses**—Refreshing Memory.—While a diary is not evidence, it may be referred to by the witness making it to refresh his recollection, as to determine where he was on a certain day.—Star Mills v. Bailey, Ky., 130 S. W. 1077.

115.——Refreshing Recollection.—Prior statements by a witness for plaintiff were inadmissible to corroborate the witness, where defendant's cross-examination did not attack the witness' credibility.—Webb Granite & Construction Co. v. Boston & M. R. R., Mass., 92 N. E. 717.